

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of

Elsworth S. & Emma R. Howell :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Year 1971. :

State of New York

County of Albany

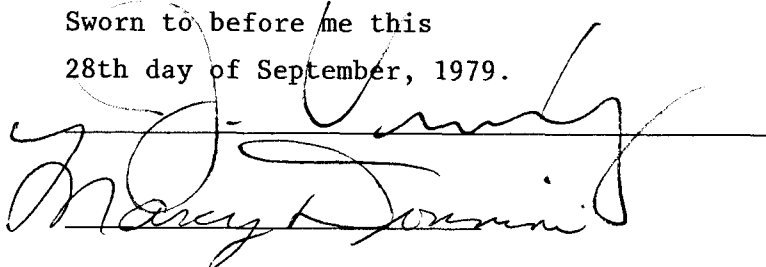
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Elsworth S. & Emma R. Howell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Elsworth S. & Emma R. Howell  
6 Tinywood Rd.  
Darien, CT 06820

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
28th day of September, 1979.



Nancy L. Quinn

STATE OF NEW YORK  
STATE TAX COMMISSION

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of

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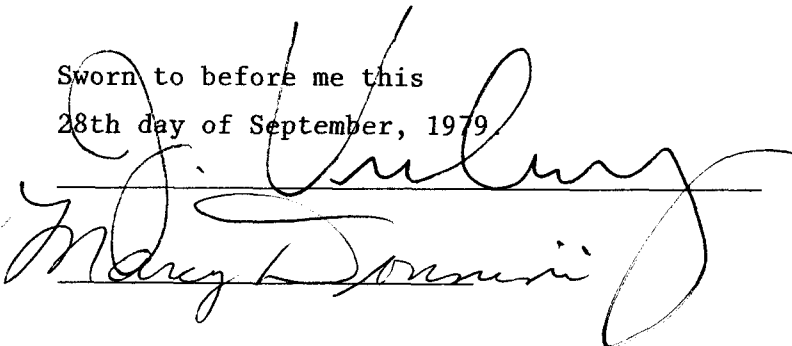
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon William L. Goldstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. William L. Goldstein  
Thomas G. Burke & Co.  
230 Park Ave.  
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
28th day of September, 1979

  
Mary L. Donnan



STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227

STATE TAX COMMISSION  
JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Elsworth S. & Emma R. Howell  
6 Tinywood Rd.  
Darien, CT 06820

Dear Mr. & Mrs. Howell:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert F. Sollecito".

cc: Petitioner's Representative  
William L. Goldstein  
Thomas G. Burke & Co.  
230 Park Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ELSWORTH S. HOWELL and EMMA R. HOWELL : DECISION  
for Redetermination of a Deficiency or :  
for Refund of Personal Income Tax under :  
Article 22 of the Tax Law for the Year :  
1971. :  
:

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Petitioners, Elsworth S. Howell and Emma R. Howell, 6 Tinywood Road, Darien, Connecticut 06820, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1971 (File No. 13234).

A formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 17, 1977 at 1:15 P.M. Petitioners appeared by Thomas G. Burke & Co. (William L. Goldstein, Esq., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether compensation received by petitioner Elsworth S. Howell, a nonresident, while on paid leave from his employment in New York State, is subject to New York State personal income tax.

FINDINGS OF FACT

1. Petitioners, Elsworth S. Howell and Emma R. Howell, jointly filed a New York State Income Tax Nonresident Return for 1971, listing their address as 6 Tinywood Road, Darien, Connecticut 06820.

2. On February 24, 1975, the Income Tax Bureau issued a revision of the Statement of Audit Changes dated May 11, 1973, computing additional income tax for 1971 of \$13,310.59, plus interest of \$2,282.37, for a total of \$15,592.96. This was done on the following grounds:

- (a) Compensation of \$148,331.42 received by petitioner Elsworth S.

Howell, while on paid leave of absence during the period January 1, 1971 through June 30, 1971, paid to him by his employer, Grolier, Incorporated (hereinafter "Grolier"), a corporation having its principal office in the City and State of New York, was derived from and connected with New York State sources, thereby constituting New York taxable income. This compensation was deemed subject to taxation in New York State, consistent with allocations contained in petitioners' 1969 and 1970 nonresident income tax returns. Said allocations were based on the proportion of services performed by petitioner Elsworth S. Howell within and without New York State during 1969 and 1970.

- (b) Compensation of \$8,000.00 received by petitioner Elsworth S.

Howell, while performing part-time services for Grolier during the period September 1, 1971 through December 31, 1971, was deemed subject to taxation in New York State in proportion to the number of days worked in this State, over the total number of days worked during the period in question  
( $24/41 \times \$8,000.00$ ).

3. A Notice of Deficiency dated February 24, 1975 was issued against petitioners for \$15,592.96, together with the aforesaid revision of the Statement of Audit Changes.

4. In 1971, petitioners were nonresidents of New York State, residing in and being domiciliaries of the State of Connecticut, maintaining no living quarters or any place of residence in New York State during that year.

5. During the period in question, petitioner Elsworth S. Howell held the position of vice-president, while also serving on Grolier's Board of Directors. Said petitioner was in charge of that company's entire mail-order sales operation throughout the United States and the world. In this capacity, petitioner's efforts did not directly result in the origination of sales orders; that is, sales orders by mail were placed irrespective of said petitioner's physical presence within or without New York State.

6. In December of 1970, petitioner Elsworth S. Howell desired to retire from his employment because of a series of physical ills and diseases and their attendant psychological stress. Instead, by letter-agreement dated December 17, 1970, petitioner Elsworth S. Howell was granted a leave of absence for reasons of health for the period January 1, 1971 through June 30, 1971 with full pay. This was in accordance with a written agreement of employment dated April 15, 1970 (the "Employment Agreement"), which had previously covered 1970 and which was extended, without change, to cover the term of such leave period.

7. The Employment Agreement provided for remuneration to him as follows:

- (a) a base minimum salary of \$1,000.00 per month;
- (b) one-tenth of one percent of ninety percent of the net collections of all United States mail-order operations of Grolier and its subsidiaries, plus one percent of ninety percent of all such net collections outside the United States;

- (c) one percent of the combined net retail branch profits of the United States mail-order operations of Grolier and its subsidiaries, plus two percent of such net retail branch profits outside the United States;
- (d) the remuneration to be paid to said petitioner from all sources could not exceed the sum of \$200,000.00 for 1970.

8. While on paid leave of absence from his employment with Grolier during the period January 1, 1971 through June 30, 1971, petitioner Elsworth S. Howell received the sum of \$148,331.42. During said period, he performed no services of any kind or nature whatsoever for Grolier and did not come into New York State for business reasons.

9. In June of 1971, petitioner Elsworth S. Howell requested that his leave of absence be continued for the remainder of the calendar year on the same terms and conditions, but such request was denied by Grolier's Board of Directors. During the months of July and August of 1971, said petitioner performed no services for Grolier and received no compensation of any kind or nature whatsoever.

10. On September 1, 1971, petitioner Elsworth S. Howell resumed his duties with Grolier and performed services on a part-time basis at a salary of \$2,000.00 per month. This arrangement continued through December 31, 1971.

11. For 1971 petitioner Elsworth S. Howell received the total sum of \$156,331.42 from Grolier, computed as follows:

- (a) the sum of \$6,000.00 representing said petitioner's base minimum salary for the period January 1, 1971 through June 30, 1971;
- (b) the sum of \$68,266.95 representing said petitioner's percentage of net collections received by Grolier in 1971 on all mail-order sales made from January 1, 1971 to June 30, 1971;

- (c) the sum of \$26,990.62 representing said petitioner's percentage of net collections received by Grolier in 1971 on all mail-order sales made prior to January 1, 1971;
- (d) the sum of \$47,073.85 representing said petitioner's percentage of the combined net retail branch operations of all mail-order operations for 1970; and
- (e) the sum of \$8,000.00 representing said petitioner's salary for part-time services rendered during the period September 1, 1971 through December 31, 1971.

12. Petitioners conceded the mathematical correctness of the allocations for 1969 and 1970 and did not contest the applicability of such allocations to the income received during the period January 1, 1971 through June 30, 1971. However, petitioners contended that only \$74,064.47 of the \$148,331.42 should be allocated on 1969 and 1970 allocation factors and that the remaining \$74,266.95 is not taxable, since no services were rendered within and without New York State for this compensation. Petitioners do not dispute the allocation of income of \$8,000.00 as provided for in Finding of Fact "2(b)", and such is not at issue in this proceeding.

#### CONCLUSIONS OF LAW

A. That petitioners, Elsworth S. Howell and Emma R. Howell, are subject to New York personal income tax to the extent of their joint New York State taxable income, pursuant to section 631 of the Tax Law.

B. That income received by petitioner Elsworth S. Howell during the period January 1, 1971 through June 30, 1971 did not qualify as an annuity within the meaning and intent of section 632(b)(2) of the Tax Law and 20 NYCRR 131.4(d).



C. That income received by petitioner Elsworth S. Howell during the period January 1, 1971 through June 30, 1971 constituted regular earnings as an employee and officer, and that said petitioner did not render any services for the compensation.

D. That compensation of \$148,331.42 earned during the period January 1, 1971 through June 30, 1971 constitutes income derived partly from New York sources, in accordance with the meaning and intent of section 632(c) of the Tax Law.

E. That the allocation of income of \$148,331.42 based on 1969 and 1970 allocation formulas represents a fair and equitable apportionment of compensation under 20 NYCRR 131.21.

F. That the petition of Elsworth S. Howell and Emma R. Howell is denied and the Notice of Deficiency dated February 24, 1975 is sustained.

DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION

*James G. Tuck*  
PRESIDENT

*Milton Krumm*  
COMMISSIONER

*Thomas H. L.*  
COMMISSIONER